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April 5, 2022

Andrew Mikell  
CATIC  
30 Kimball Avenue, Ste. 206  
S. Burlington, VT 05403

Re: H.512: An Act relating to modernizing land records and notarial acts law

Dear Andy:

You asked my opinion about curious statements made in House committee meetings recently concerning H.512. Those statements included a conclusion or perception that municipal clerks are constitutionally protected (immune) from oversight by the legislature because they are elected officials. For the reasons stated below, that conclusion is incorrect. The legislature has full authority to oversee and regulate municipal clerks, irrespective of whether they are elected or appointed.

Last month the House Commerce and Economic Development committee took up H. 512. As introduced, H.512 proposed to modernize the state's municipal records laws by, among other things, creating uniform indexing and creating a land records office to be housed within the Vermont Secretary of State's office. <sup>1</sup> The office would oversee and manage all aspects Vermont's land records system.

Testimony was presented in House Commerce that Vermont's current system (which is comprised of 245 separate and independent business models, and which lacks uniform indexing

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<sup>1</sup> The statement of purpose of the bill recites:

- (a) Pursuant to 1 V.S.A. § 317a, public records in general and archival records in particular should be systematically managed to provide ready access to essential information, to promote the efficient and economical operation of government, and to preserve their legal, administrative, and informational value.
- (b) ...
- (c) In order to modernize the existing system and to create consistency in recording and indexing practices, this subchapter establishes a municipal Land Records Management Office to oversee the management of Vermont's municipal land records. The Office shall be responsible for overseeing the implementation and utilization of modern methods, techniques, equipment, documentation, and training that will improve the quality of public service with respect to land records and help to achieve a high degree of standardization throughout the State. The Office shall provide technical assistance to municipal officials in their efforts to further enhance their abilities to provide the best possible service to their public.(emphasis supplied)

and recording methodologies) is the worst in the nation. Other witnesses suggested that regulating municipal clerks may be unconstitutional because they are elected officials.

After taking testimony on the bill prior to reporting it out to the House Government Operations committee, the Commerce committee stripped out all portions of the bill which would actually have modernized the land records. The Committee removed the provisions which would have adopted uniform indexing standards and which would have created a state land records office with oversight authority. When the bill was reported to House Government Operations, it as stated that municipal clerks are “independent authorities” on records such that regulation of clerks was not unconstitutionally permissible due to a “constitutional conflict.”

After being voted out of House Government Operations, H.512 found its way back to House Commerce where, prior to voting to approve the bill as amended, committee members made statements to the effect that, based on the Vermont Constitution, the Legislature was powerless, and lacked authority, to regulate and oversee municipal clerks because they were elected officials. The committee concluded that the only parties with authority over municipal clerks vis-à-vis maintaining municipal land records were the voters of that municipality or possibly the local governing board, e.g. selectboard or city council.

Clearly this is an unusual position to take in light of the state’s long recognition that it is not a home rule state, that “towns are mere creatures of the legislature” and not independent political subdivisions. *Sargent v. Clark*, 83 Vt. 523 (1910). All the powers of towns and town officials are established in statute.

The Vermont Constitution includes one mention of the office of town clerk. This is Chapter II, Section 62, which states that “All deeds and conveyances of lands shall be recorded in the Town Clerk's office in their respective towns; and, for want thereof, in the County Clerk's office in the same county.” This section settles where land records should be recorded. It does not address the method of recording and indexing records, and it cannot be read to prevent the legislature from adopting laws that reasonably mandate how those functions are implemented, nor can it be read to conclude that the legislature lacks authority to oversee the enforcement of rules and regulations governing the handling of such important matters as municipal land records.

There is no constitutional conflict of interest created here. Municipal clerks, like all government officials, elected or appointed, are governed by laws. The legislature has full authority to oversee and regulate the functions of municipal clerks concerning land records. If clerks fail to adhere to state statutes governing all of their duties, from elections to vital records to land records, they may be compelled to do so in the courts. The constitution does not immunize them from oversight and compliance with statutes; in fact, statutes define their powers and limitations, and there is little left over for the exercise of discretion or conscience. See *Brady v. Dean*, 173 Vt. 542 (2001), where town clerks failed to avoid having to issue civil union licenses on grounds of a religious exemption.

Municipal clerks must obey the law. That they are elected by voters does not change that fact. The claim that a state official couldn’t regulate their actions on municipal records is unsupportable as a matter of law. Listers are regulated by the Vermont Department of Taxes. Vital Records is a function overseen by the State Department of Health. If Vermont were to assign

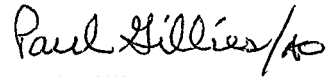
Andrew Mikell

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enforcement of a code of municipal recordkeeping to a state official, this would in no manner offend the Vermont Constitution or compromise any legal authority of municipal clerks.

Sincerely,

A handwritten signature in cursive script that reads "Paul Gillies" followed by a stylized flourish or mark.

Paul Gillies